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Attorney Docket No. 09159.0003-00000

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

|                             |   |                        |
|-----------------------------|---|------------------------|
| In re Application of:       | ) |                        |
|                             | ) |                        |
| Christian TOURRE et al.     | ) | Group Art Unit: 3728   |
|                             | ) |                        |
| Application No.: 09/852,712 | ) | Examiner: S. LUONG     |
|                             | ) |                        |
| Filed: May 11, 2001         | ) |                        |
|                             | ) |                        |
| For: PACKET OF TISSUES      | ) | Confirmation No.: 5186 |

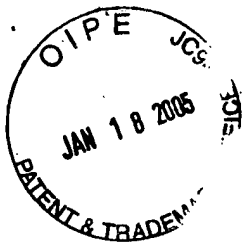
**MAIL STOP APPEAL BRIEF—PATENTS**

Commissioner for Patents  
P.O. Box 1450  
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Sir:

**REPLY BRIEF UNDER 37 C.F.R. § 41.41**

Pursuant to 37 C.F.R. § 41.41, Appellants present this reply to the Examiner's Answer mailed November 17, 2004, in further support of the Notice of Appeal filed June 1, 2004, and Appeal Brief filed September 30, 2004. Because Appellants submit this Reply Brief within two months of the Examiner's Answer and January 17, 2005, was a federal holiday, it is timely. 37 C.F.R. § 41.41(a)(1); 35 U.S.C. § 21(b). If any additional fees are required for this Reply Brief or if the enclosed payment is insufficient, Appellants request that the required fees be charged to Deposit Account No. 06-0916.



## TABLE OF CONTENTS

|       |  |    |
|-------|--|----|
| I.    | Introduction .....   | 1  |
| II.   | "Simple" Inventions Are Nonetheless Patentable.....                      | 1  |
| III.  | Inherent Characteristics of the Claimed Invention Cannot Be Ignored..... | 2  |
| IV.   | No Reference Shows the Inherent Crush Resistance and Rigidity .....      | 4  |
| V.    | The Examiner Cannot Rely Solely on Personal Conclusions.....             | 5  |
| VI.   | Williams Is Non-Analogous Art.....                                       | 6  |
| VII.  | Wewers Remedies None of the Prior Art's Deficiencies .....               | 8  |
| VIII. | The Prior Art Does Not Suggest the Height and Width of Claim 17 .....    | 10 |
| IX.   | The Prior Art Does Not Suggest the Grasp Area of Claim 19 .....          | 11 |
| X.    | The Crush Resistance and Rigidity Are Unexpected and Nonobvious .....    | 12 |
| XI.   | The Unexpected Features Contradict An Obvious Change in Shape .....      | 13 |
| XII.  | Conclusion .....   | 15 |

## **TABLE OF AUTHORITIES**

### **CASES**

|   |         |
|---|---------|
| <i>In re Antonie</i> , 559 F.2d 618 (C.C.P.A. 1977) .....   | 3       |
| <i>In re Bigio</i> , 381 F.3d 1320 (Fed. Cir. 2004) .....   | 6, 7, 9 |
| <i>Brown v. District of Columbia</i> , 130 U.S. 87 (1889) .....   | 3       |
| <i>C. &amp; A. Potts &amp; Co. v. Creager</i> , 155 U.S. 597 (1895) .....   | 1       |
| <i>In re Dailey</i> , 357 F.2d 669 (C.C.P.A. 1966) .....  | 13, 14  |
| <i>Gentry Gallery, Inc., v. Berkline Corp.</i> , 134 F.3d 1473 (Fed. Cir. 1998) .....                             | 2       |
| <i>Lindemann Maschinenfabrik GMBH v. American Hoist and Derrick Co.</i> ,<br>730 F.2d 1452 (Fed. Cir. 1984) ..... | 4       |
| <i>In re McLaughlin</i> , 443 F.2d 1392 (C.C.P.A. 1971) .....   | 5       |
| <i>In re Mills</i> , 916 F.2d 680 (Fed. Cir. 1990) .....  | 11      |
| <i>Ex parte Moore</i> , Appeal No. 96-2852 (B.P.A.I. 1996) .....  | 13, 14  |
| <i>In re Oetiker</i> , 977 F.2d 1443 (Fed. Cir. 1992) .....   | 2       |
| <i>In re Soni</i> , 54 F.3d 746 (Fed. Cir. 1995) .....  | 12      |
| <i>In re Zurko</i> , 258 F.3d 1379 (Fed. Cir. 2001) .....   | 5       |

### **OTHER REFERENCES**

|   |    |
|---|----|
| Manual of Patent Examining Procedure § 2125 ..... | 12 |
|---|----|

**I. Introduction**

In the Examiner's Answer dated November 17, 2004, the Examiner maintained the rejection of claims 16-22 and 30-31. In particular, the claims stand rejected under 35 U.S.C. § 103(a) as obvious over the admitted prior art, shown in Figures 1-2 and described on page 4 of the specification, in view of U.S. Patent No. 5,244,025 to Wewers and U.S. Patent No. 3,129,811 to Williams. See Examiner's Answer at page 3. The claims also stand rejected as obvious over U.S. Patent No. 5,018,625 to Focke et al. or U.S. Patent 4,460,088 to Regenstein et al. in view of Wewers and Williams. See *id.* at page 4. In addition to maintaining these grounds of rejection, the Examiner has provided specific responses to certain of Appellants' arguments presented in the Appeal Brief. Appellants continue to disagree with the rejections and, for the reasons of record and the additional reasons presented below, respectfully request that the rejections be withdrawn and that claims 16-22 and 30-31 be allowed.

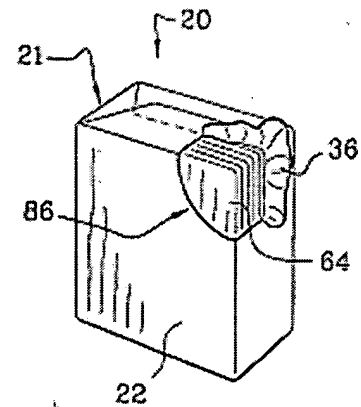
**II. "Simple" Inventions Are Nonetheless Patentable**

While at first blush such an invention may seem so simple that it would have been obvious to a skilled artisan under 35 U.S.C. § 103(a), it is well-settled that "simple" inventions may nonetheless be patentable. The U.S. Supreme Court has stated that "[t]he apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to anyone familiar with the subject; but the decisive answer is that, with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to anyone before." *C. & A. Potts & Co. v. Creager*, 155 U.S. 597, 608 (1895). More recently, the Federal Circuit has reinforced the fact that "simple"

inventions are patentable. See, e.g., *Gentry Gallery, Inc., v. Berkline Corp.*, 134 F.3d 1473, 1478 (Fed. Cir. 1998); *In re Oetiker*, 977 F.2d 1443, 1447 (Fed. Cir. 1992).

As illustrated in figure 12 from the specification, for example, the currently claimed invention is, in part, a tissue packet with front and rear faces in the shape of a square.

One unexpected benefit of this claimed arrangement is an improved resistance to crushing over previous tissue packet designs. In spite of the arguments and proofs already submitted during prosecution and in the Appeal



**Fig. 12**

Brief, Appellants believe the Examiner has confused the apparent simplicity of the claimed invention with its obviousness. Appellants continue to submit herein that the invention is patentable over all the cited references and that any asserted case of *prima facie* obviousness must fail.

### **III. Inherent Characteristics of the Claimed Invention Cannot Be Ignored**

As shown above, each pending claim recites, in part, a packet of tissues including a stack of tissues covered by a wrapper such that the packet has a square front face and a square rear face. This structure provides the Appellants' tissue packet with unexpected resistance to crushing. Specifically, the filled tissue packets of the present invention exhibit a crush resistance 2.5 times higher than that of known packets, while partially-filled packets exhibit a resistance as much as 16 times higher than known packets. See specification at p. 6, lines 8-14.

However, the Examiner erroneously believes that no evidence regarding the crush resistance of Appellants' invention is necessary because "[t]he claims never indicated the resistance of the package either structurally or functionally." Examiner's Answer at page 6. Instead, the Examiner asserts that the "appellant is arguing [more] narrow[ly] than what is claimed" when discussing the increased crush resistance and rigidity of the present invention. *Id.* Appellants note that the Examiner raises this issue for the first time in the Examiner's Answer, even though Appellants brought these features of the claimed invention to the attention of the Examiner at an early stage of prosecution. See Response dated October 30, 2003, at page 8. Appellants assert that the Examiner must consider the increased crush resistance and strength characteristics of the presently claimed invention for at least the following reasons.

The U.S. Supreme Court stated in *Brown v. District of Columbia* that a patentee may rely on the inherent characteristics of its claimed invention to defend against an obviousness challenge. See 130 U.S. 87, 100 (1889). The Court of Customs and Patent Appeals has agreed, stating that in an obviousness determination the Examiner must consider the whole invention, including the inherent features and/or improvements, and not just what is expressly claimed. See *In re Antonie*, 559 F.2d 618, 619 (C.C.P.A. 1977) ("In delineating the invention as a whole, we look not only to the subject matter which is literally recited in the claim in question . . . but also to those properties of the subject matter which are inherent in the subject matter *and* are disclosed in the specification") (emphasis added). Thus, the fact that the inherent features of improved rigidity and structural integrity are not expressly recited in the pending claims does not negate their consideration in an obviousness determination.

**IV. No Reference Shows the Inherent Crush Resistance and Rigidity**

As discussed above, the square shape of the tissue packet recited in each pending claim is inherently responsible for increased crush resistance and rigidity of the packet. Thus, because the increased crush resistance is an inherent characteristic of the claimed invention, Appellants may rely on the tissue packet's unexpected crush resistance to defend against an obviousness challenge.

In spite of this well-founded principle of patent law, the Examiner's remarks indicate that the Examiner has consistently failed to consider the crush resistance and rigidity as part of the obviousness determination. As the Federal Circuit has explained, "[a]ll evidence must be considered *before* a conclusion on obviousness is reached." *Lindemann Maschinenfabrik GMBH v. American Hoist and Derrick Co.*, 730 F.2d 1452, 1461 (Fed. Cir. 1984). Appellants believe that proper consideration of these characteristics of the claimed invention would show that a skilled artisan would not have found the present invention obvious over the cited references.

The prior art provides absolutely no reason to expect the degree of increased crush resistance exhibited by Appellants' invention. None of the references cited, either separately or in any combination, teach or suggest the crush resistance and rigidity exhibited by the currently claimed invention. Despite Appellants' recognition of this deficiency (see Appeal Brief at page 16), the Examiner improperly continues to exclude these attributes from the analysis of the prior art. As such, Appellants assert that the present invention, when considered as a whole, is not rendered obvious by the cited prior art references. The rejections under 35 U.S.C. § 103(a) should be withdrawn.

**V. The Examiner Cannot Rely Solely on Personal Conclusions**

If improvements in structural integrity and rigidity are to be readily expected from using a square-shaped tissue packet, as suggested by the Examiner, one would expect the Examiner easily to find a number of references disclosing a square-shaped tissue packet having the associated improvements in rigidity and crush resistance. Yet, as discussed above, the Examiner has failed to disclose even a single reference teaching or suggesting these expressly claimed and inherent features.

As the Federal Circuit has explained, an Examiner must provide concrete evidence on core factual findings and not simply rely on personal conclusions. See *In re Zurko*, 258 F.3d 1379, 1386 (Fed. Cir. 2001) (“With respect to core factual findings in a determination of patentability, however, the Board cannot simply reach conclusions based on its own understanding or experience—or on its assessment of what would be basic knowledge or common sense. Rather, the Board must point to some concrete evidence in the record in support of these findings”). Appellants find no such concrete evidence in the record disclosing either the claimed square-shaped tissue packet or the enhanced structural integrity inherently provided by such a packet.

Instead, the Examiner asserts that a skilled artisan would have been motivated to modify the primary references based only on the unfounded and unsupported assessment of what would be basic knowledge and common sense. For this reason, Appellants provided the Examiner with multiple opportunities to provide a reference that discloses a superior rigidity being associated with square packaging. The Examiner apparently could not find such a reference. Therefore, unlike *In re McLaughlin*, the Examiner’s inability to find even one reference that shows these features, as known to a



skilled artisan at the time the instant invention was made, highlights the impermissible use of hindsight reasoning in asserting the obviousness of the claims. 443 F.2d 1392, 1395 (C.C.P.A. 1971) (finding a hindsight reconstruction proper only when the cited references themselves suggested their combination for use with the same purpose). For each of these reasons, Appellants believe the Examiner has failed to establish a *prima facie* case of obviousness and that claims 16-22 and 30-31 are patentable over all of the cited references.

**VI. Williams Is Non-Analogous Art**

With respect to Williams, the Examiner asserts that it would have been obvious to combine the soft outer package recited by the admitted prior art with the folded tissue of Williams to allow for ease of transportation. See Examiner's Answer at page 7. The admitted prior art, as shown by Figures 1-2 and described in page 4 of the specification, discloses a rectangular-shaped tissue packet. Williams discloses a rectangular waterproof envelope containing an absorbent sheet of material impregnated with a liquid treating agent. See col. 2, lines 43-53 and Figure 1. Appellants believe that Williams is non-analogous art and that one of ordinary skill in the art would not have looked to Williams in order to achieve the claimed invention.

The Federal Circuit recently reiterated the two separate tests to define the scope of a prior art reference and determine if it is sufficiently analogous for use in an obviousness determination: the "field of endeavor" test, and if not met, whether the reference is reasonably pertinent to the problem involved with the invention. *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

In his arguments as to why Williams and the present invention would be analogous, the Examiner states that “they are in the same field of endeavor because both are directed to packaging sheet material for cleansing purpose.” Examiner’s Answer at page 6. When viewed as a whole, Williams teaches a sealed, one-use, rectangular package for leak-proof storage and transporting of liquid treating materials, such as those for personal care purposes, including an applicator. See col. 1, lines 22 to 60. Quite differently, the present invention concerns a non-sealed, multiple use, square-shaped structure for substantially dry paper tissue materials. See specification at page 1. Moreover, the present invention is concerned with the arranging of multiple tissues so that the stack does not become deformed when a tissue is extracted. See *id.* at page 2. Williams does not suggest or even contemplate such an arrangement, highlighted by the fact that its package contains liquid and that the entire package is meant for disposal after only one use. See col. 6, lines 7 to 11. As such, regardless of any supposed similarity by way of comprising tissue products, a comparison of Williams to the specification’s own disclosure of the subject matter at hand reveals that the reference fails the “field of endeavor” test. See *In re Bigio*, 381 F.3d at 1325-26 (stating that the field of endeavor is determined in reference to the specification).

Second, Williams seeks to solve problems dealing with the effective storage, transportation, and application of liquid materials, not providing a stack of substantially dry tissue materials with ease of extraction from a wrapper and enhanced crush resistance. See specification at page 2, paragraph 2. In fact, given the liquid contents and disposable nature of Williams’ packages, ease of extraction and crush resistance as used in the present invention are not even necessary or contemplated. Thus,

Williams contains no description that is reasonably pertinent to the problem involved with the present invention. As such, Appellants believe that Williams is non-analogous art and would not have been considered by the skilled artisan in attempting to achieve the claimed invention.

However, even if a person having ordinary skill in the art would have considered Williams, the Examiner provides no reason to modify the rectangular shape of Williams' package or applicator, other than to fit into a package taught by the primary references that has been modified to have a square shape. Yet neither Williams nor any other reference would have provided any motivation to modify the prior art tissue packets to have a square shape. Thus, any combination that a skilled artisan may make with Williams would still yield a tissue packet having a rectangular shape and, thus, would not render obvious the pending claims.

**VII. Wewers Remedies None of the Prior Art's Deficiencies**

The Examiner maintains that modifying the shape of the admitted prior art to include the square shape of the protective china jacket of Wewers would be an obvious design choice. See Examiner's Answer at page 4. The Examiner further explains that one of ordinary skill in the art would expect a square-shaped tissue packet to provide improved rigidity and structural integrity. Thus, according to the Examiner, a skilled artisan would have been motivated to modify the rectangular prior art tissue packets to have a square shape as a matter of design choice, to achieve superior rigidity, and to reduce material cost. See *id.*

The Examiner's reliance on Wewers only for its square-shaped bag (see Examiner's Answer at page 7) reveals that this reference cannot remedy the deficiencies already highlighted with the other prior art references. Moreover, the Examiner has failed to address the many weaknesses that Appellants identified in the Appeal Brief with respect to this combination. See Appeal Brief at pages 14-18.

First, Wewers is non-analogous art because it teaches flannel jackets for protecting individual pieces of chinaware and not structures for stacked tissues or other paper products. Because china itself is comparatively rigid and strong, the flannel jackets are designed to protect only against the china pieces knocking against each and causing nicks and scrapes, and do not provide any sort of crush resistance to the stored china. See, e.g., *In re Bigio*, *supra*.

Second, Wewers fails to provide sufficient motivation for modifying the shape of the non-square tissue packets disclosed by the primary references. Most china plates are round in shape, making a square-shaped protective jacket an easy choice due to the ease of fitting it around the plate. Tissues, however, come in many shapes and may fit into almost any shape structure, making a square shape a non-obvious choice.

Third, the protective jackets of Wewers, which do not enhance the rigidity of chinaware, are designed to protect single items of chinaware, as opposed to a stack of chinaware. As such, Wewers provides the skilled artisan no reason to believe that the square shape of its individual protective jackets would translate into increased crush resistance in a tissue packet containing a stack of tissues, particularly when the tissues themselves are square.

Finally, in light of at least these shortcomings, applying Wewers clearly reflects the use of pure impermissible hindsight. The failure of the Examiner to address these weaknesses is further evidence that the combination of Wewers with the primary references is improper.

**VIII. The Prior Art Does Not Suggest the Height and Width of Claim 17**

Claim 17 recites that “the height and width of the wrapper and tissue stack are between 50 and 58 millimeters.” The Examiner states that it would have been obvious to achieve the recited height and width as a matter of routine experimentation. See Examiner’s Answer at page 6. Appellants continue to disagree with the Examiner. Even though this issue was advanced in the Appeal Brief, the Examiner has still failed to produce a single reference that teaches either a square-shaped tissue packet or these particular dimensions. In light of these deficiencies, the skilled artisan would not have found obvious a square-shaped tissue packet having a height and width between 50 and 58 millimeters.

Wewers, relied on by the Examiner for its square shape, concerns the protection of porcelain china using flannel jackets. This particular problem addressed by Wewers represents a field of endeavor far removed from that of the present invention. As such, its teachings are clearly non-analogous to the claimed invention.

But even if the skilled artisan would have considered Wewers, the reference fails to provide sufficient motivation for modifying the shape of the non-square prior art tissue packets, as discussed above. See section VII, *supra*. And even if the skilled artisan were to somehow find motivation to modify prior art tissue packets to include a square

shape, Wewers provides no reasonable expectation of success in achieving a square-shaped tissue packet having a height and width between 50 and 58 millimeters. In contrast, the protective jackets of Wewers range in size from seven to twelve inches in order to fit normal-sized pieces of china. See col. 2, lines 17-39. Therefore, china protectors that are 50 to 58 millimeters in size would be completely unusable from any standpoint. Accordingly, Wewers teaches away from the claimed height and width.

Any attempts at modifying a tissue packet to include the square shape of Wewers and the dimensions recited by claim 17 would require experimentation far beyond what is routine and shows that a skilled artisan would have no reasonable expectation of success in achieving the claimed invention. For at least these reasons, the invention of claim 17 would not have been obvious to one of skill in the art.

**IX. The Prior Art Does Not Suggest the Grasp Area of Claim 19**

With respect to claim 19, the Examiner asserts that figures 1 and 2 of the present application, part of the admitted prior art, and the figures in Regenstein et al. and Focke et al. show a grasp area between one-third and one-half of the size of the wrapper surface. See Examiner's Answer at page 6. The Examiner attempts to explain that the wrapper face of these figures can be divided into two or three equal sizes and, thus, render obvious claim 19. However, as clearly illustrated in each of the figures identified above, there is no disclosure of a tissue packet with a grasp area between one-third and one-half of the size of the wrapper surface.

First, the mere fact that a reference can be modified does not indicate obviousness unless the modification or combination is suggested. See *In re Mills*, 916

F.2d 680 (Fed. Cir. 1990). In addition, although “[d]rawings and pictures can anticipate claims if they clearly show the structure which is claimed,” “[w]hen the reference does not disclose that the drawings are to scale and is silent as to dimensions, arguments based on measurement of the drawing features are of little value.” Manual of Patent Examining Procedure § 2125 (emphasis added). None of the references provide any suggestion to provide a grasp area having the claimed dimensions. Moreover, as the figures are clearly not drawn to scale and do not include dimensions at all, they do not clearly show the claimed dimensions and, therefore, cannot properly be relied on by the Examiner as a basis for rejection. For at least these reasons, the Examiner has failed to establish a *prima facie* case of obviousness with respect to claim 19.

**X. The Crush Resistance and Rigidity Are Unexpected and Nonobvious**

Should the Examiner improperly continue to exclude the inherent characteristics from consideration of the presently claimed invention, the Examiner is nonetheless required to consider rebuttal evidence. Appellants’ proof of unexpected results, as shown by the data present in the original specification, successfully rebuts any asserted *prima facie* case of obviousness. Appellants note that no separate declaration under 37 C.F.R. § 1.132 is needed to assert these unexpected results because the original specification itself describes these results and has been sworn to by the inventors.

The improved crush resistance and rigidity exhibited by Appellants’ tissue packet (see specification at page 6) is surprising and, therefore, would not have been obvious to one having skill in the art. See *In re Soni*, 54 F.3d 746, 750 (Fed. Cir. 1995) (“[T]hat which would have been surprising to a person of ordinary skill in a particular art would

not have been obvious.”). As the increased crush resistance of the claimed invention clearly rises to the level of unexpected and surprising, Appellants believe this evidence rebuts any asserted *prima facie* case of obviousness, thereby rendering the present claims in immediate condition for allowance.

**XI. The Facts of This Case Contradict an Obvious Change in Shape**

The fundamental issue in this case is that the square shape of the claimed tissue packet results in unexpected improvements in rigidity and crush resistance, which the Examiner has consistently failed to recognize. Instead, the Examiner has taken this essential feature and asserted that it is an obvious change in shape in view of nothing more than unsupported conclusions and a flannel chinaware protective jacket.

A change in shape in may only be obvious when “[a]ppellants have presented no argument which convinces [the court] that the particular configuration . . . is significant or is anything more than one of numerous configurations a person of ordinary skill in the art would find obvious.” *In re Dailey*, 357 F.2d 669, 672-673 (C.C.P.A. 1966) (emphasis added). However, in this case Appellants have clearly shown that one of ordinary skill would not have found obvious the square-shaped configuration of the pending claims.

Moreover, the Board of Patent Appeals and Interferences has found patentability when the shape of an invention was important and not taught or suggested by any prior art. See *Ex parte Moore*, Appeal No. 96-2852 (B.P.A.I.) (*available at* 1996 WL 1796237) (unpublished opinion). In that case, the Board found that the shape of the invention recited in the claims was patentably significant because it solved a problem



stated in the specification and no other prior art taught or suggested such a shape for the claimed product, distinguishing that situation from *In re Dailey*. *Id.* at \*2.

The facts of this case are more analogous to the facts of *Ex parte Moore* than to *In re Dailey*. For example, Appellants have presented numerous convincing arguments that the square shape of the presently claimed tissue packet is both significant and non-obvious over the cited prior art. Therefore, *In re Dailey* does not apply. Furthermore, the improved structural rigidity and crush resistance exhibited by the claimed tissue packet solve a problem that existed in the prior art, as recognized by the original specification (see specification at pages 1-2), and the prior art does not teach or suggest such a square shape. Therefore, although not precedential, the holding of *Ex Parte Moore* should be instructive to find that the square shape of Appellants' tissue packets would not have been obvious to the skilled artisan.

The Examiner baldly asserts that "a change in shape is well recognized within the ordinary skill in the [ ] art, absent any showing of unexpected results." Examiner's Answer at page 5. Appellants have shown herein that the square shape of the present invention is not a well-recognized and obvious change. Thus *In re Dailey* itself supports Appellants' argument that the presently claimed invention is not obvious. 357 F.2d at 672-673. Moreover, the Examiner has failed to consider the claimed invention's unexpected results discussed in the specification. See page 6. Even if the Examiner improperly continues to assert a *prima facie* case of obviousness over the cited references, this rebuttal evidence of unexpected increases in rigidity and crush resistance clearly precludes a holding of obviousness. Therefore, Appellants submit that the rejections of claims 16-22 and 30-31 under 35 U.S.C. § 103 must be withdrawn.

**XII. Conclusion**

For at least the reasons discussed above, Appellants submit that the Examiner has failed to establish a *prima facie* case of obviousness of claims 16-22 and 30-31. Moreover, the evidence of unexpected results properly submitted and not considered by the Examiner plainly refutes any asserted *prima facie* case. Therefore, Appellants earnestly solicit the withdrawal of both outstanding rejections and the allowance of pending claims 16-22 and 30-31. In the event the Examiner continues to disagree, Appellants have filed herewith a Request for Oral Hearing under 37 C.F.R. § 41.47 before the Board of Patent Appeals and Interferences. Appellants appreciate the Board's earliest consideration of this Appeal so as to advance the pending claims of this application towards allowance.

If there are any fees due that are not enclosed herewith, including any fees required for an extension of time or any other fees required for the timely entry and proper consideration of the Reply Brief, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
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Dated: January 18, 2005

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